

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR 21 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0321-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
BERNARD ERNEST COLONNA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20041698 and CR-20042959

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By Nancy F. Jones

Tucson
Attorneys for Petitioner

ESPINOSA, Judge.

¶1 Petitioner Bernard Colonna pled guilty in two cases to one count each of aggravated driving under the influence of an intoxicant while his license was suspended or revoked; he also admitted in CR-20042959 that he had an historical prior felony conviction. The trial court sentenced him to a presumptive prison term of 4.5 years in CR-20042959,

to be followed by a ten-year period of probation in CR-20041698. Colonna seeks review of the trial court's denial of his subsequent petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We review a trial court's post-conviction ruling for an abuse of discretion. *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001). We find no abuse here.

¶2 In his petition, Colonna sought to be resentenced to a shorter prison term based on his claim of newly discovered evidence—that the Department of Corrections provides inadequate medical care to diabetic inmates. Colonna argued that information was not available to either him or the trial court at the time he was sentenced, but its existence could have affected his prison sentence. In denying relief and dismissing the post-conviction petition, the trial court found Colonna had failed to establish one of the requirements for a claim of newly discovered evidence. Specifically, the court observed that Colonna's "medical treatment since he has been in the Department of Corrections could not have been in existence at the time of sentencing." To the extent such a claim is even cognizable under Rule 32.1, the court did not abuse its discretion in so ruling. *See Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d at 150.

¶3 To state a colorable claim of newly discovered evidence entitling a defendant to an evidentiary hearing and, perhaps, to post-conviction relief, the defendant must show (1) material facts were discovered after trial, (2) the defendant exercised due diligence in discovering those facts, (3) the facts are not merely cumulative or impeaching, and they

would probably have changed the verdict or sentence. Ariz. R. Crim. P. 32.1(e). As to the first requirement, “the evidence must appear on its face to have existed at the time of trial but be discovered after trial.” *State v. Bilke*, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989). As the trial court correctly noted, the medical care Colonna received did not exist at the time he was sentenced; it did not exist until after he was sentenced and became an inmate. Accordingly, he could not meet a threshold requirement for a colorable claim of newly discovered evidence. *See id.*

¶4 We find unavailing Colonna’s reliance on *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. 1990). In that case, unlike Colonna’s, the defendant discovered about six months after he was sentenced that he suffered from a potentially terminal illness. Division One of this court remanded the case to the trial court for an evidentiary hearing on the defendant’s claim of newly discovered evidence because the court had not addressed the claim on its merits, believing it had no jurisdiction to modify the defendant’s sentences after they had been affirmed on appeal. *Id.* at 128-29, 800 P.2d at 994-95. That scenario does not exist here. The trial court recognized it had jurisdiction to modify Colonna’s sentences; it simply ruled he did not meet one of the requirements for a colorable claim of newly discovered evidence.

¶5 Moreover, although Colonna phrased his claim in terms of the medical care the Department of Corrections provides inmates suffering from diabetes, the only evidence he presented to support that claim was evidence about the specific care he had received since

his incarceration. He presented no evidence about the Department's care of other diabetic inmates and no evidence comparing the care he received to the care received by others. And, although the state did not dispute the medical evidence Colonna presented, his doctor's letter attached to the post-conviction petition did not state that the care he was receiving was improper or below accepted standards of care in the medical community. We note as well that he agreed in pleading guilty that neither a substantially mitigated nor a mitigated sentence was available for the conviction in CR-20042959.

¶6 Therefore, although we grant the petition for review, we deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge